

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

TITIO CONTRACTORS, INC.

and

INTERNATIONAL UNION OF PAINTERS  
AND ALLIED TRADES, AFL-CIO,  
DISTRICT COUNCIL 51

Cases 5-CA-119008  
5-CA-119096  
5-CA-119414  
5-CA-123265  
5-CA-129503  
5-CA-131619  
5-CA-134285

**RESPONSE TO NOTICE TO SHOW CAUSE  
OF TITO CONTRACTORS, INC. THAT GENERAL  
COUNSEL'S MOTION FOR PARTIAL SUMMARY  
JUDGMENT SHOULD NOT BE GRANTED**

Tito Contractors, Inc. ("Tito") hereby responds to the Board's Notice to Show Cause. The General Counsel's Motion for Partial Summary Judgment should not be granted.

The General Counsel filed a Motion for Partial Summary Judgment with respect to Tito's Amended Answer to the Compliance Specification. In its Compliance Specification the General Counsel sets forth the Board's Order issued in the Decision and Order of the National Labor Relations Board on March 29, 2018 (366 NLRB No. 47). As set forth in the Board's Order, and referenced in the Compliance Specification, the Order required Tito, in part, to:

Notify Maryland Environmental Services (MES) in writing that it requests the reinstatement of Marian Sanchez, Arceley Ramos, Reeyna Sorto, Yasmin Ramirez and Maria Chavez to their former jobs at its Shady Grove (Derwood), Maryland facility, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Compliance Specification at p. 1, B; Board Order at p. 8. While the General Counsel noted that Tito lost its contract with MES on April 16, 2016, it failed to address that part of the Order set

forth above requiring Tito to “request” MES to reinstate the 5 MES discriminatees. General Counsel fails to state, much less acknowledge, that Tito fulfilled the requirement and that MES did not allow for the reinstatement of the 5 discriminatees at the Shady Grove recycling facility. Exh. 1 attached hereto. Nor did MES allow the reinstatement of the 5 discriminatees at any MES facility where Tito provided labor to MES. Exhibit 2 attached hereto. This necessarily precluded reinstatement. Back pay would therefore be tolled as of the date reinstatement was foreclosed. Compliance Manual 10536.2. This compliance issue has not been litigated or decided by the Board. Nor has the issue of this part of the Board’s Order on a back pay remedy , back pay period, and the affect of the requirement that MES allow the reinstatement of the 5 discriminatees. General Counsel’s motion fails to address the material issues of fact.

**A. MES Has Exclusive Control Over Its Recycling Facilities, Including Which Employees Are Allowed To Work There.**

MES is a Maryland governmental agency and is not within the jurisdiction of the Board. Montgomery County, Maryland owns the Recycling Center, and overall responsibility for it rests with the Department of Environmental Protection and the Division of Solid Waste Services. In a state and county partnership, MES operates the facility. MES hires contractors, such as Tito, to provide labor to run the recycling facility at the direction of MES. These employees are under the supervision of MES and MES sets their wages and subsidizes the employee benefits. MES sets the hours of work and number of workers required, including any of the contractor’s employees. MES does not guarantee hours of work, and may unilaterally change the hours of work each day and week. MES requires that the contractor have a certain number of employees available each day. That number can change each day at the direction of MES. MES can directly hire the contractors employees and/or it can hire its own employees to replace a contractor’s employee. MES has the right to request that a contractor replace an employee and that employee must be

replaced by the contractor at the start of the next business day following verbal notification from a MES supervisor. MES controls which employees can work at its facility. This information is from the standard contractor-MES contract, which Tito was a party. The terms of this contract were non-negotiable. As applicable here, if MES does not want a particular employee of a contractor assigned to its project, that employee cannot work on the project.

Based on the above facts, both the ALJ and the Board included the necessary requirement of MES' allowance and approval of reinstatement as a condition to remedial relief. Tito's obligation was to request the reinstatement the 5 discriminatees. It did so, but MES did not allow it.<sup>1</sup> By the plain terms of the Order, the Board conditioned the remedy on MES' assent to reinstatement. See. GC Memorandum, Memorandum OM 22-43 (March 11, 2002) ("Board Orders define the legal rights and obligations of the parties...").

**B. The Reinstatement And Back Pay Period For The 5 MES Employees Has Not Been Litigated And Is Ripe For Adjudication In This Proceeding**

MES was well aware of the ALJ's Order of Reinstatement of the 5 discriminatees and MES affirmatively stated to Tito that it would not permit the 5 discriminatees to return to a MES facility to work. As set forth above, MES, not Tito, controlled access to its facilities and, as such, MES had its own reasons to bar access to the 5 affected employees for work. The reasons for MES's decision not to allow the 5 discriminatees to return is beyond the jurisdiction of the Board. Whether MES' decision was correct or not is not the issue as acknowledged by the Board in its Order. This was MES' unilateral decision to make. Moreover, the issue - - as it pertains to MES - - is distinct from the issue of the terminations of the 5 discriminatees by Tito, which was the subject of the underlying ULP proceeding. The adjudication of this issue impacts any back-pay

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<sup>1</sup> The MES jobs were the only recycling jobs the 5 discriminatees could perform. Tito had no other recycling type jobs or similar general unskilled labor contracts outside of MES. At the time Tito had carpentry and painting contracts with other agencies which required skilled labor. The recycling employees could not perform those jobs.

award to the 5 discriminatees, including whether the back-pay period is tolled and the what is the appropriate back-pay period, if any. These are all issues addressed in Tito's amended answer to the Compliance Specification. They have not been previously litigated and they have not been decided by the Board.

In its Motion for Partial Summary Judgment the General Counsel argues that the Board's affirmance that Tito's encouragement to MES to remove the 5 recycling employees and require their terminations forecloses the issue of MES's position and its decision - - after the ALJ and Board decisions - - to refuse their reinstatements. The General Counsel does not address the issue of reinstatement and indeed, it cannot, since it has not been litigated. MES was well aware of the ALJ and Board decisions which held that Tito violated Section 8(a)(3) and (1) by encouraging MES to remove and require the termination of the recycling center employees. This holding with respect to the discharges is separate and distinct from the issue of reinstatement and the back pay period. If it were not there would be no need to include MES in the Order.

It is evident why both the ALJ and the Board Orders required that Tito notify MES that it requested the reinstatement of the recycling employees. The Orders acknowledge that it was MES who removed the employees from the contract, but at the encouragement of Tito. The reinstatement issue is different. It was an MES decision, and it was independent of the termination decision. The ALJ noted that "Tito has not shown that MES would have, independently, without its involvement, have sought the removal of the five alleged discriminatees from the Shady Grove jobsite." 366 NLRB No. 47, slip. Op. at 23-24. However, as set forth in Exhibit 1 this reasoning does not apply to reinstatement. MES' position on the return of the five recycling employees was they did not want them to return to the facility, period - - based on their own observations - - rightly

or wrongly. It was MES' decision to make. At a minimum, genuine issues of fact to preclude summary judgment on this issue. The issue has not been litigated.

Indeed, the Board's "rule against relitigation" does not apply here. Unlike *M.D. Miller Trucking & Topsoil, Inc.*, 363 NLRB No. 49, slip. Op. at 2 (and cases cited therein), the issue of reinstatement has not been litigated. If it were, neither the ALJ nor the Board would have set forth the requirement that MES to reinstate the recycling center employees. The letter from the Assistant Attorney General for the State of Maryland dated February 4, 2015 provides, in part:

The following sets the position of Maryland Environmental Service concerning the return of certain former employees of Tito Contractors, Inc. to the MES operated Montgomery County Resource Facility.

The Assistant Attorney General then goes on to state that MES do not want each of the employees to return to the facility.<sup>2</sup> Unlike the issue of medical certification to return to work that was litigated in the underlying ULP hearing in *M.D. Miller Trucking & Topsoil, Inc.*, supra, which was again raised in the employers' answer to the compliance specification, there is no such relitigation in this case. Here, Tito anticipates calling the MES representative at the compliance hearing to place on the record its position to the reinstatement of 5 recycling employees in light of the Board's remedial Order. Material issues of fact remain unresolved which preclude summary judgment on this issue. Tito has also provided in its Amended Answer alternative facts for determining the back pay period as contemplated by Section 102.56(b) of the Board's rules.<sup>3</sup> Compare, *Michael Cetta, Inc., d/b/a Sparks Restaurant and UFCUW, Local 342*, 370 NLRB No. 46, slip. Op. at 2.

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<sup>2</sup> The Attorney General later clarified that its reinstatement position applied to all MES facilities.

<sup>3</sup> Tito originally understood that the Region's position was that the back pay was tolled as of February 4, 2015 - - the date of the MES letter (Exh. 1). That position would, at least, be more plausible than General Counsel's position set forth in the Compliance Specification, which finds no support in the record.


The General Counsel wrongly argues that the Board has already addressed the issue of whether MES would allow the 5 recycling employees to return to the facility, or any MES facility, after their discharges. However, nowhere in the Board decision is this issue addressed, and General Counsel fails to cite to any discussion of this issue in the Board decision. The General Counsel's argument is not only devoid of any support in the record, it is illogical. Only after reaching its decision did the Board set forth its Order. That Order included Tito's requirement to request that MES reinstate the 5 recycling employees. Thus, the first time reinstatement was raised and MES' role in any reinstatement Order was the Order itself. The Board realized that reinstatement of the recycling employees would have to be approved by MES, even with Tito requesting their reinstatement. These issues have not been litigated.

**C. Material Issues Of Disputed Facts Preclude Partial Summary Judgment On The Back Pay Period**

The back pay period is "[t]he period during which back pay liability accrues, beginning when the unlawful action took place and ending when a valid offer of reinstatement is made or when the backpay period is tolled for other valid reasons ... ." Compliance Manual 10536.2. The Compliance Manual further advises that "[t]here are, however, situations in which reinstatement is not appropriate and is instead precluded." Where, as here, a respondent claims that reinstatement is not appropriate or available under the circumstances, it is the responsibility of the Compliance Officer to investigate the situation and recommend a Regional determination. Compliance Manual 10532.1. When it is determined that reinstatement is precluded, back pay is tolled as the date it was foreclosed. Compliance Manual 10536.2. These issues, which have been raised in the Amended Answer, are material, and remain unresolved. As such, summary judgment is not appropriate.

Because the Board has no jurisdiction over MES, and Tito could not reinstate the recycling employees without MES' approval (as acknowledged in the Board's Order), the arguments advanced by the General Counsel related to the backpay period and the Order in its Motion are without any record to support a finding on summary judgment. The General Counsel's Motion for Partial Summary Judgment must be denied.<sup>4</sup>

Respectfully submitted,



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<sup>4</sup> The granting of the General Counsel's motion will not streamline this case. Tito has also raised other issues that are not subject to the Motion and, thus, there would nevertheless be a hearing, absent settlement.